

a

KEMAJUAN HUNDA KREDIT (KUCHING) SDN. BHD.

v.

TITUS CHUO MUI ING

b

HIGH COURT SABAH & SARAWAK, KUCHING
DATO' HJ. ABDUL KADIR BIN SULAIMAN J
[CIVIL APPEAL NO. KG 11 OF 1994(11)]
19 JANUARY 1995

c

PRACTICE & PROCEDURE: *Appeal from Subordinate Court - Decision appealed against made before coming into force of O. 49 r. 6 Subordinate Courts Rules 1980 - Notice of appeal filed after the coming into force of r. 6 - Time period for filing record of appeal - Whether O. 49 r. 6(3) applicable - Whether procedure to follow is O. 49 r. 3A(3).*

d

The plaintiff appealed against the decision of the learned Magistrate setting aside the summary judgment entered against the respondent. The order to set aside the summary judgment was made prior to the coming into force of O. 49 r. 6 of the Subordinate Courts Rules 1980 (SCR 1980). The notice of appeal was filed after the said rule had come into force.

e

The respondent, contending that O. 49 r. 6(3) SCR 1980 requires that the record of appeal must be filed within 3 weeks after the filing of the notice of appeal, argued that the record of appeal was filed out of time as it was only filed on 28 April 1994 whereas the notice of appeal was filed on 2 August 1993.

f

The respondent also argued that the appeal should be dismissed on the grounds that the plaintiff had included in his record of appeal matters "prohibited" by r. 6(3) and that by doing so the plaintiff had not complied with the statutory provision.

g

The plaintiff argued that O. 49 r. 6(3) SCR 1980 does not apply in the instant case because the order appealed against was made before the coming into force of r. 6. The plaintiff contended that the procedure to follow is O. 49 r. 3A(3) notwithstanding the amendment and argued that in the circumstances the record of appeal had been filed well within time.

h

Held:

[1] The nature of the appeal in this case is no longer governed by O. 49 r. 3A but by O. 49 r. 6(3) SCR 1980 because the appeal is against the decision "other than a decision made after trial", namely a decision made in summary proceedings. Under r. 6(3), the notes of evidence and the grounds of decision no longer form part of the record of appeal.

i

[2] Without having to consider whether the operation of r.6 is retrospective or otherwise, the filing of the notice of appeal in this case was done after the coming into force of r. 6 on 1 August 1993. As the rule was already in operation on the date of filing of the notice of appeal, the filing of the record of appeal must comply with the requirement of r. 6(3) notwithstanding the fact that the decision appealed against was made before the coming into force of the rule.

[3] Since the record of appeal was only filed on 28 April 1994, it is certainly outside the period prescribed by the rules and this is clearly in violation of the requirement of the statutory provision. In the circumstances, the respondent's objection on this ground must succeed and the appeal of the plaintiff must be dismissed for failure to comply with O. 40 r. 6(3) SCR 1980 as regards the time limit for filing of the record of appeal.

[4] Insofar as the respondent's other objection is concerned, the non-compliance is merely as to the plaintiff supplying more matters than is necessary for compliance with O. 49 r. 6(3) SCR 1980. These additional material are not in any way prejudicial and accordingly the respondent's preliminary objection on this ground must be overruled.

[Appeal dismissed with costs to the respondent]

Case referred to:

Ng Yit Seng & Ors. v. Syarikat Jiwa Mentakab Sdn. Bhd. & Ors. [1981]2 MLJ 194(dist)

Legislation referred to:

Federal Court (Civil Appeals) (Transitional) Rules 1963, r. 19(8)

Rules of the High Court 1980, O. 56

Subordinate Courts Rules 1980, O. 49 rr. 1, 2, 3, 3A (3) & (4), 6(1)(2)(3), O. 26A r. 1, 11

For the appellant - T.O. Tan; M/s. Tan, Yap & Tang

For the respondent - K.C. Wong; M/s. K.C. Wong & Associates

JUDGMENT

Hj. Abdul Kadir bin Sulaiman J:

Prior to 1 August 1993 there was a common procedure for appeals from the decisions of Subordinate Courts to the High Court as provided by O. 49 of the Subordinate Courts Rules 1980 (hereinafter referred to as "the Rules") irrespective of whether a decision arose out of a full trial or out of summary proceedings. Rule 1 defines "decision" to include "judgment", "order" and "decree". The procedure for filing and service of the notice of appeal and appeal record are to be found in rr. 2, 3 and 3A of the Rules. However, by P.U.(A) 193/93 the Rules provide a new r. 6 to O. 49 to take effect from 1 August 1993. The effect of the amendment is that as from that date, the procedure for appeals in respect of a decision arising out of summary proceedings in a Subordinate Court, is taken out of rr. 2,3 and 3A of O. 49 of the Rules, and replaced by this new r. 6. As regard the time for the service of the record of appeal, r. 6 is silent and in the circumstances, by necessary implication, based on the provision of r. 3A(4), it must be done within the period limited for the filing of such record, which according to r. 6(3) is within three weeks of the filling of the notice of appeal. This appeal being in relation to a decision made in a summary proceedings lies to a Judge in chambers.

The new O. 49 r. 6 states:

- 6(1) Notwithstanding anything contained in this Order, an appeal shall lie to a Judge in chambers from any decision made by the Court other than a decision made after trial.
- (2) The appeal shall be brought by filing a notice of appeal in Form 140 within 14 days from the day on which the decision was pronounced, and serving a copy of the notice on every other party to the proceedings within the time limited for the filing of appeal to the Registrar of the High Court.
- (3) Within three weeks after the filing of the notice of appeal, the appellant shall file the record of appeal in the High Court and the record shall contain copies of -
 - (a) the application for the decision;
 - (b) the statement of claim, and where defence has been filed, the statement of defence;
 - (c) all affidavits filed in support of or in opposition to the application; and
 - (d) the decision appealed from,

but shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.

a This new O. 49 r. 6 is akin to O. 56 of the Rules of High Court 1980 (hereinafter referred to as “the RHC”) where an appeal would lie to a Judge in chambers from any judgment, order or decision of the Registrar. The hearing before the Judge in chambers pursuant to O. 56 of the RHC is by way of a rehearing and for that reason the new O. 49 r. 6(3) of the Rules is tailored in such a way that the notes of evidence, the grounds of judgment and memorandum of appeal are not required to be included in the record of appeal.

b On 6 February 1990, the appellant, who is the plaintiff in the Court below and for convenience will be referred to as such in this judgment, obtained summary judgments against two defendants which includes the 2nd defendant, the respondent in this appeal, pursuant to his application made under O. 26A(1) of the Rules. On 20 July 1993, on the application of the 2nd defendant, the learned Magistrate set aside that order for summary judgment entered against him. The plaintiff, not happy with the decision filed his notice of appeal on 2 August 1993 which is one day after the coming into force of r. 6 to O. 49 of the Rules. On 28 April 1994, after a lapse of about 9 months after the filing of the notice of appeal, the plaintiff filed his record of appeal.

d When this appeal of the plaintiff came up for hearing, the learned Counsel for the 2nd defendant raised a preliminary objection concerning the time the plaintiff took to file the record of appeal after the filing of his notice of appeal and as to its content, in the light of the said amendment to the Rules.

The plaintiff’s record of appeal contains the following:

- (a) the summons;
- (b) the joint defence of both the defendants including the 2nd defendant;
- e** (c) notice of application under O. 26A r. 1 made by the plaintiff for summary judgment;
- (d) the Court order of 6 January 1990 for summary judgment;
- (e) notice of application under O. 26A r. 11 made by the 2nd defendant to set aside the order for summary judgment;
- f** (f) the Court order of 20 July 1993 setting aside the summary judgment;
- (g) the statement of defence of the 2nd defendant made pursuant to the Court order setting aside the summary judgment;
- (h) the notes of evidence before the learned Magistrate;
- g** (i) the Magistrate’s ground of order setting aside the summary judgment;
- (j) the notice of appeal; and
- (k) the memorandum of appeal.

h By his preliminary objection, the learned Counsel for the 2nd defendant urged upon the Court to dismiss the appeal of the plaintiff on the ground firstly, that the plaintiff had included in his record of appeal those matters “prohibited” by r. 6(3) of O. 49 of the Rules i.e. items (h), (i) and (k) mentioned above. The learned Counsel submitted that since O. 49 r. 6(3) of the Rules does not allow the inclusion of the notes of evidence, the grounds of judgment or any memorandum of appeal, the plaintiff by doing so in this case has not complied with the statutory provision. He cited the case of *Ng Yit Seng & Ors. v. Syarikat Jiwa Mentakab Sdn. Bhd. & Ors.* [1981] 2 MLJ 194 wherein the Federal Court held that the appeal must be dismissed because the appellant had failed to comply with the statutory provisions. In that

i

case the subject matter of noncompliance with the statutory provision is the failure to serve the copy of the record of appeal on the respondents or their solicitors as required by r. 19(8) of the Federal Court (Civil Appeals) (Transitional) Rules 1963. In my view, the decision in that case can be easily distinguished on the facts. At p. 195, Abdoolcader J (as he then was) said:

We have in our judgment in *Pow Hing & Anor. v. Registrar of Titles, Malacca* (at p. 157) set out an exposition of the mandatory-directory dichotomy in relation to statutory requirements and it is only necessary to add in the context of the matter before us that even in relation to directory provisions substantial compliance is still necessary and that the failure to observe directory requirements may also lead to invalidity.

In this case, the non-compliance is merely as to the plaintiff supplying more matters than is necessary for compliance with O. 49 r. 6(3) of the Rules. By analogy of the requirement of O. 56 of the RHC of the rehearing of the appeal, these additional informations to the Judge in chambers will not in any way prejudice the plaintiff. I will accordingly overrule this preliminary objection on that ground.

Then comes the second objection by the learned Counsel for the 2nd defendant that the filing of the record of appeal by the plaintiff is out of time. Order 49 r. 6(3) requires that the record of appeal must be filed within three weeks after the filing of the notice of appeal. In this case the notice of appeal was filed on 2 August 1993 whilst the record of appeal was filed only on 28 April 1994, which is clearly outside the time frame of three weeks allowed by the rule. The learned Counsel for the plaintiff in reply submitted that O. 49 r.6(3) does not apply in the instant case because the order appealed against was made before the coming into force of r. 6. The procedure to follow is O. 49 r. 3A(3) notwithstanding the amendment. Under O. 49 r. 3A(3) the appeal record is required to be filed within six weeks of the receipt of the notification from the Court appealed from that the certified copies of the notes of evidence and the grounds of judgment are ready. In this case, the learned Counsel says, the notification from the Court appealed from of the availability of the certified copies of the notes of evidence and the grounds of judgment was received only on 18 April 1994 and he has six weeks from that date to file the record under O. 49 r. 3A(3) of the Rules. Hence the filing of the record on 28 April 1994 was well within time. I think the submission lacks merit because the nature of the appeal in this case w.e.f. 1 August 1993, as stated earlier, is no longer governed by O. 49 r. 3A but by O. 49 r. 6(3) because the appeal is against the decision “other than a decision made after trial” which in this case is a decision made in a summary proceedings. Under r. 6(3), the notes of evidence and the grounds of decision no longer form part of the record of appeal. Without having to consider whether the operation of r. 6 is retrospective or otherwise, the filing of the notice of appeal in this case was done **after** its coming into force on 1 August 1993. As such the rule was already in operation on the date of the filing of the notice of appeal and consequently the filing of the record of appeal must comply with the requirement of r. 6(3) i.e. within three weeks after the filing of the notice of appeal notwithstanding the fact that the decision appealed against was made before the coming into force of the rule. The said three weeks had expired on or about 23 August 1993. Since the filing of the record in this case was done only on 28 April 1994, clearly it is outside the period prescribed by the Rules. This is clearly in violation of the requirement of the statutory provision. In the circumstances, the objection by the 2nd defendant on this ground must succeed and as such the appeal of the plaintiff in this matter before me must be dismissed for failure to comply with O. 49 r. 6(3) of the Rules as regards the filing of the record of appeal.

Appeal dismissed with costs to the 2nd defendant/respondent.